Supreme Court, U.S.
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No. 99-163

In The

Supreme Court of the United States

CYNTHIA and ROBERT BAGLEY, GARY and CYNTHIA ST. PIERRE, DENNIS and PATRICIA COLE, RICKY and MARY THORNTON, AND JACK and STACIA FITCH,

Petitioners,

v.

RAYMOND SCHOOL DEPARTMENT, MAINE DEPARTMENT OF EDUCATION and its COMMISSIONER J. DUKE ALBANESE, TIMOTHY HUMPHREY, JANE HUMPHREY, FRANK MCDERMOTT, TIMOTHY MORIN, JOAN MORIN, TIMOTHY FITZGERALD, KEN WILLIAMS, BARBARA WILLIAMS, and the MAINE CIVIL LIBERTIES UNION,

Respondents.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

The tuitioning programs of Maine and Vermont are the largest, oldest, and most comprehensive[1] systems of parental school choice in the United States. Though both were religiously neutral for most of their long histories, misinterpretations of this Court's Establishment Clause cases led the Vermont Supreme Court and the Maine Legislature to exclude religious schools from parents' choices, thereby violating the Equal Protection Clause of the Fourteenth Amendment. Review of the Maine Supreme Judicial Court's decision in *Bagley v. Raymond School Department* offers this Court a timely and appropriate opportunity to correct these longstanding violations of fundamental civil liberties.

In an effort to dissuade this Court from accepting this case for review, the various respondents[2] have made a variety of arguments that misstate petitioners' arguments, mischaracterize the decision below, and misunderstand this Court's precedents. Respondents seek to obfuscate the question presented by the petition, which is whether the Maine Court is correct in its ruling that Maine is required to exclude religious schools from its otherwise neutral tuitioning system in order to avoid violating the Establishment Clause. Contrary to respondents' assertions, the Maine Court clearly had to reach this question in its decision. And just as clearly, its answer puts its decision (and the First Circuit's parallel decision in *Strout v. Albanese*, 178 F.3d 57 (1999), *cert. pet. pending*, 68 U.S.L.W. 3129 (Aug. 24, 1999)) in conflict with the decisions

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[1] By "most complete" petitioners mean that in towns that opt to use the tuitioning system *all* children attend schools chosen by their parents because their school districts do not operate public schools for them to attend.

[2] There are two respondents' briefs, one filed by the state defendants (hereinafter the State Defendants' Brief) and the other by the Timothy Humphrey et al. and Maine Civil Liberties Union intervenors (hereinafter the Intervenors' Brief).

of four other state supreme courts[3] and a decision of the Eighth Circuit.[4]

II. THE EQUAL PROTECTION ISSUE IS PROPERLY FRAMED FOR REVIEW

The State Defendants assert that the issues that petitioners wish to present to the Court are not properly framed in the record. They assert that the petitioners have not shown that sending their sons to Cheverus, a Jesuit high school, is mandated by their religion, and imply that this showing is necessary to assertion of their equal protection claim. In so doing, the respondents have confused the Free Exercise claim[5] petitioners made in the Court below with the Equal Protection claim made below that is the only claim petitioners have chosen to ask this Court to review.[6] There is not now and

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[3] *Campbell v. Manchester Bd. of School Directors*, 641 A.2d 352 (Vt. 1994); *Jackson v. Benson*, 578 N.W.2d 602 (Wisc.), *cert. denied*, 119 S.Ct. 466 (1998); *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. pet. pending*, 67 U.S.L.W. 3671 (April 26, 1999); *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio 1999).

[4] *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

[5] The State Defendants rely on a quotation from *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), that on its face addresses only "the free exercise inquiry."

[6] In the Court below, petitioners alleged that Maine had violated the Free Exercise rights of the Bagleys and the Establishment Clause with respect to all of the petitioners. The petitioners continue to believe that the Maine Court's rejection of those claims was clearly incorrect. Petitioners, however, elected to ask this Court only to review the rejection of their Equal Protection claim, because the resolution of that claim required the Maine Court to consider whether Maine was correct in its conclusion that the Establishment Clause required Maine to exclude the choice of religious schools, which is the same issue presented by the parental school choice cases with which the Maine decision conflicts. The State Defendants continue to attack arguments that the petitioners are not making before this Court.

never has been a requirement that to assert an equal protection claim alleging harm from a classification based on religion, as Maine's exclusion of religious schools plainly is, one must allege that a substantial burden has been placed on the observance of a central tenet of one's religion. Maine's exclusion of religious schools harms all those who have selected such schools for their children's educations, regardless of their motivation for selecting such schools.

The State Defendants also allege that the issue is not properly framed in the record because the Maine Court felt that it did not have sufficient factual information to address the entanglement prong of the *Lemon* test. Petitioners submit that the record shows that to allow families to select religious schools again, as they could prior to the exclusion of such schools in 1981, would not result in excessive entanglement of the government with religion. The Maine Court and the respondents think that it would be necessary for Maine to police the religious schools to ensure that any "aid" they receive is limited to secular aspects of the educational process, as this Court required in cases such as *Tilton v. Richardson*, 403 U.S. 672 (1971), and *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736 (1976). Those cases, however, involved direct aid to the schools as institutions, and were premised on the understanding that it is possible to separate secular and religious aspects of the educational process at those schools. The Maine tuitioning program, on the other hand, provides aid to the eligible families and not to the schools[7]; hence, if the program were religiously-neutral again, any "aid" received by a religious school would be the result of the independent choice of the parents, and therefore

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[7] As we argued in our Petition, the mere fact that the tuition funds are transmitted directly to the schools should not be misconstrued as aid to or subsidization of the schools. The eligible families are the beneficiaries of the tuitioning program, and the schools they select are service providers, as in the many other programs we cited in our Petition at 19, footnote 16.

would not trigger a requirement to segregate funds exclusively for secular aspects of the schools' educational processes.[8] Because there would be no need to monitor the use of tuition funds by Cheverus to prevent the advancement of religion, the respondents and the Maine Court's concerns about the excessive entanglement inquiry are misplaced. As a matter of historical note, prior to its exclusion from the program in 1981, Cheverus participated in the tuitioning program without difficulty and without any special treatment being necessary.

III. *BAGLEY* IS NOT CONSISTENT WITH THIS COURT'S PRECEDENTS AND DOES CONFLICT WITH OTHER STATE SUPREME COURTS AND FEDERAL APPELLATE DECISIONS

The State Defendants assert that *Bagley* is consistent with this Court's precedents holding that "direct financial subsidies to a pervasively sectarian school for religious education is and remains unconstitutional" State Defendants Brief at 10. The State Defendants make the same mistake that the Maine Court did in *Bagley*, namely, to equate the direct transmission of tuition payments to the school with direct financial subsidies of the school. As we showed in our Petition, the fact that money is sent to a religious school does not make it a subsidy of the school. In this case, for example, if the Raymond School Department paid the tuition to Cheverus, it would merely displace the tuition the petitioners paid – in other words, Cheverus would not be any better off than

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[8] In a pervasively sectarian school such as Cheverus High School, such an effort would be futile by definition. But that is irrelevant if the purpose of the excessive entanglement inquiry is to avoid pervasive monitoring of religious institutions to prevent government aid from advancing religion. Here the school is admittedly pervasively sectarian, but no monitoring with respect to religion would be required at all, because the aid would be provided to the parents in full compliance with the religion clauses' requirement of governmental neutrality.

before, a strange sort of "subsidy."[9] The obvious beneficiaries of the tuition are the families like the petitioners who are otherwise liable for the tuition payments.[10]

By incorrectly viewing tuitioning as a direct subsidy program, the State Defendants (and the Maine Court) fail to see that this Court's decision in *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), does not control the outcome of this case and that cases subsequent to Nyquist like *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), are much closer to being on point. *Nyquist* itself in footnote 38, 413 U.S. at 782-83 n.38, makes clear that this Court was reserving judgment on programs like Maine's used to be when it included religious schools among the options parents could choose. And *Witters* makes it clear that where the program is religiously neutral and leaves the choice of institution up to the independent choice of the beneficiaries there is no Establishment Clause violation even if the school selected is pervasively religious and the education obtained religious in nature.

The State Defendants make the same mistake in their failed effort to distinguish the decisions of the Arizona, Ohio, Vermont, and Wisconsin Supreme Courts and the Eighth Circuit. They simply take for granted that the Maine Supreme Judicial Court is correct in its conclusion that to pay religious schools tuition is to provide direct financial subsidies to those

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[9] A school like Cheverus, which has a waiting list, does not lack for paying customers. Although the respondents have never noted it, the only real financial benefit to Cheverus from participation in the tuitioning program is that it would be relieved from providing scholarship assistance to several of the petitioners who need it and could aid other families.

[10] Obviously, a decision ultimately favorable to petitioners can be viewed as beneficial to religious schools that subsequently participate in the tuitioning program, but such benefits are plainly indirect and derive not from the direct transmission of tuition payments but rather from the increased number of students who would now be able to partake of their services. Such effects are far more attenuated than the benefits schools such as those in *Tilton* and *Roemer* receive from the institutional aid provided under those programs.

schools. Since those other cases found that any financial benefit to the schools involved in those other programs was indirect and attenuated, the State Defendants find those cases distinguishable. They simply fail to address the reason those other courts found the aid to be indirect and attenuated, a reason that applies with equal force to Maine's tuitioning program. That reason is, of course, that any benefit received by religious schools is the product of the free and independent choices of the families under a program that provides no incentive to select a religious rather than a nonreligious alternative, the rationale underpinning this Court's decisions in *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters*; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); and *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995). The Bagley holding creates a direct conflict with these precedents.

IV. *BAGLEY* PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THE ESTABLISHMENT CLAUSE QUESTION OF WHETHER RELIGIOUS SCHOOLS MUST BE EXCLUDED FROM PARENTAL CHOICE PROGRAMS

The Intervenors make the curious argument that *Bagley*, in which the Maine Court explicitly held that the Establishment Clause precluded Maine from including religious schools in its tuitioning program, is not an "appropriate" vehicle for this Court to review the question of whether "voucher" programs can include religious schools. This is, of course, nonsensical. The Maine Court has held that Maine was constitutionally required to exclude religious schools from its program because their inclusion would be impermissible under the First Amendment, and this decision is in clear and direct conflict with those courts that have held that school choice programs can include such schools.[11]

To support their position, Intervenors are driven to distort the decision below and to grossly mischaracterize petitioners'

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[11] See the cases cited in footnote 3, *supra*.

arguments. They argue that the Maine Court held that the petitioners lacked standing to assert their equal protection claim, which the court clearly did not hold,[12] and that petitioners are arguing that Maine's exclusion of religious schools only became "irrational" because of Supreme Court cases decided since Maine's 1981 exclusion of religious schools, which petitioners have never claimed. Petitioners have argued throughout this litigation that Maine's exclusion of religious schools violated the equal protection clause when passed in 1981[13] and continues to violate that clause, with this Court's post-1981 jurisprudence serving to confirm that *Nyquist* does not apply to nor invalidate Maine's former practice of tuitioning to religious schools on an equal basis as secular schools.[14]

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[12] In the decision below, the Maine Court concluded that "the parents present an important [Equal Protection] issue worthy of evaluation", Pet. App. at 19, and then proceeded to evaluate the claim for the next 26 pages, the vast majority of its decision. Pet. App. at 19-45. Nor do the Intervenors cite a single case (since none exist) to support the idea that parents wishing to use their tuition allotments at a religious school lack standing to challenge the exclusion of religious schools from the program. The Maine Court's statement that "Ordinarily, the Equal Protection claim here would be asserted, not by potential clients of the excluded institution, but by the school itself" merely reflects the Court's mistaken view of the program as providing institutional aid (direct financial subsidies) to the participating schools, as evidenced by the Court's citation for its statement to *Columbia Union College v. Clarke*, 159 F.3d 151 (4th Cir. 1998), an institutional aid case.

[13] We do not read Intervenors' Brief as challenging the Maine Court's conclusions that "the Legislature enacted the exclusion in direct response to developments in Establishment Clause jurisprudence in the 1970's." Pet. App. at 24, and that the exclusion was in fact adopted to avoid a violation of that Clause. The language of the exclusion itself and its genesis leave no doubt as to the actual purpose of the Legislature in enacting the change. Intervenors are reduced to creating a fictional claim that petitioners are arguing only that the exclusion became irrational some time after enactment.

[14] Intervenors cite to petitioners' reference in our Petition to this Court's post-*Nyquist* cases upholding aid to families selecting religious schools for their specious assertion that we claim that there is no longer a

Intervenors assert that this case is not appropriate for review because there are no facts on the percentages of families selecting religious options (a fact they view as critical under *Nyquist*) due to the fact that religious schools have been excluded from the program since 1981.[15] Their misrepresentation also allows them to conveniently ignore the fact that the data they assert are so necessary to evaluation of this issue *exists in the record for 1980*, the last year before Maine excluded the religious schools. As we noted in our Petition, according to the State Defendants only 211 (1.2%) of Maine's 17,928 tuitioned students attended religious schools. By the Intervenors' own theory then, the facts of this case distinguish it from *Nyquist*. Moreover, if any case is relevant to *Bagley*, it must be *Witters*, where the opinion notes that few if any other beneficiaries selected a religious education option. *Witters*, 474 U.S. at 488.

Intervenors also claim that two summary affirmances by this Court, *Brusca v. Missouri*, 405 U.S. 1050 (1972), *aff'g* 332 F. Supp. 275 (E.D. Mo. 1971), and *Leutkemeyer v. Kaufmann*, 419 U.S. 888 (1974), *aff'g* 364 F. Supp. 376 (E.D. Mo. 1973), should have led the Maine Court to reject petitioners' equal protection claim. These cases are so readily distinguishable that one wonders why the Intervenors suggest

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rational basis for excluding religious schools. Intervenors' Brief at 17, referencing Pet. at 13. As the immediately preceding paragraph of our Petition makes obvious, we argue that *Nyquist* never applied to a religiously-neutral parental-choice program like Maine's by specifically reserving that question. Pet. at 12.

[15] Petitioners, of course, do not agree that how many families select a religious education option should be dispositive where the program is religiously-neutral and where parents make the choice of school they want their children to attend. *See Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law"); and *Agostini v. Felton*, 521 U.S. 203, 229 (1997) ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid").

they should have controlled resolution of this claim. In both cases, the claim was that because the state funded secular public schools it violated equal protection not to fund private religious schools or the transportation of pupils thereto. The classification challenged in those cases was public versus private schools, a line not drawn on the basis of religion. In *Bagley*, on the other hand, there are no public schools operated by tuitioning districts and the challenged classification is explicitly on the basis of religion: secular schools, whether public or private, can be chosen, while religious schools cannot.

In short, the Intervenors would have this Court believe that although *Bagley* presents the concededly important issue of "whether and under what circumstances public funds may be used to pay for pupils to attend sectarian private schools without violating the Establishment Clause," it does so in a "muddled, hypothetical posture" rendering it inappropriate for review. Intervenors' Brief at 18. Petitioners submit that it is not *Bagley* that is muddled, but rather Intervenors' arguments. The Establishment Clause issue presented in *Bagley* is no more "hypothetical" than the similar Establishment Clause issues in such cases as *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger*, to name just two examples of other cases where defendants have asserted that the Establishment Clause required them to exclude based upon religion and this Court had to rule on the validity of the defense.

Nor should this Court accept the Intervenors' suggestion, based on Judge Campbell's concurring opinion in *Strout*, that a rational fear that a state might violate the Establishment Clause suffices to justify the exclusion of the religious options of parents. Such a position would allow the infringement of fundamental First and Fourteenth Amendment liberties whenever government had to face a difficult constitutional question. That is not now and, we trust, never will be, the position of this Court.

V. CONCLUSION

The Respondents in this case fear that this Court will accept the instant case for review, because they are aware of the degree to which the Maine Supreme Judicial Court misread, misunderstood, and misapplied this Court's Establishment Clause precedents. Their briefs in opposition to the Petition seek to misdirect the attention of this Court from the central holding of the Maine Court, which of necessity addressed petitioners' claim that Maine's exclusion of religious schools lacked sufficient justification to withstand *any* level of equal protection scrutiny because it misinterpreted the Establishment Clause. The *Bagley* decision squarely and unequivocally conflicts with decisions of other state supreme courts and a federal appellate court that have addressed the same issue in recent years, and the time is ripe for this Court to resolve the conflict. Petitioners urge this Court to grant their Petition and provide lower courts, and state legislatures, with the guidance they so sorely need.

Respectfully submitted,

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